

The Honorable James L. Robart

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

Idaho Rivers United, et al., )  
Plaintiffs, )  
v. ) Case No. 14-cv-1800-JLR  
U.S. Army Corps of Engineers, ) Federal Defendant's Opposition to  
Defendant, ) Motion for Preliminary Injunction  
and ) Noted for December 19, 2014  
Inland Port and Navigation ) Hearing: January 2, 2015, 9am  
Group, et al., )  
Defendant-Intervenors. )

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## Introduction

This case involves the U.S. Army Corps of Engineers' implementation of Congress's directive to maintain commercial navigation on the Lower Snake River. In developing a long-term management plan for addressing sediment accumulation, the Corps identified a current and immediate need to reestablish the federal navigation channel to its Congressionally-specified dimensions at two discrete locations on the 140-mile channel. The first is on the downstream side of the Ice Harbor Dam's navigation lock. The second is at the confluence of the Snake and Clearwater rivers near Clarkston, Washington. Water depth at those locations is as low as nine and seven feet, respectively, and is interfering with safe navigation. Plaintiffs' motion to enjoin the Corps action should be denied. Plaintiffs present only a speculative harm to Pacific lamprey and fail to raise even a serious question going to the merits of their claims. Granting the motion, by contrast, would leave the channel at dimensions other than those specified by Congress and continue to present a harm to navigational safety.

## Factual Background

The Lower Snake River federal navigation channel is located between the Snake River's confluence with the Columbia River near Pasco, Washington, and its confluence with the Clearwater River near the Washington-Idaho border. EIS at 1-6.<sup>1</sup> Congress first authorized the Corps to maintain the Lower Snake for navigation in 1945. See Flood Control Act of 1945, Pub. L. 97-14, 59 Stat. 10, 21 (Mar. 2, 1945). Eighteen years later, in 1962, Congress legislated that "the depth and width of the authorized channel in the Columbia-Snake River barge navigation project shall be established as fourteen feet and two hundred and fifty feet, respectively, at minimum regulated flow." Flood Control Act of 1962, Pub. L. 87-874, 76 Stat. 1173, 1193 (Oct. 23, 1962) (emphasis

<sup>1</sup> “EIS” citations refer to the Lower Snake River Programmatic Sediment Management Plan Final Environmental Impact Statement. The portions to which we cite are attached as Exhibit 1 to the Declaration of Kristofor R. Swanson (“Swanson Decl.”).

1 added). The Lower Snake is home to four multipurpose Corps civil works lock and dam  
 2 projects. From west to east, they are Ice Harbor Dam, Lower Monumental Dam, Little  
 3 Goose Dam, and Lower Granite Dam. EIS at 1-6, 1-7. In addition to navigation, the  
 4 projects serve purposes of power generation, recreation, fish and wildlife conservation,  
 5 and incidental water supply for irrigation. EIS at 1-4, 1-7. The Corps collectively refers  
 6 to these as “the Lower Snake River Projects.” Decl. of Lt. Col. Timothy R. Vail ¶ 2.

7 **I. The Corps’ Programmatic Sediment Management Plan**

8 Like any river, the Lower Snake is subject to constant erosion, currents, and  
 9 sedimentation that combine to impact river depth and dimension. Historically, when  
 10 those forces have altered the navigation channel from Congress’s authorized  
 11 dimensions, the Corps has dredged the encroaching areas. EIS at 1-4. In 2002, to  
 12 evaluate alternatives for managing disposal of any future sediment it may dredge from  
 13 the Lower Snake River, the Corps prepared a Dredged Material Management Plan. *See*  
 14 EIS at 1-3. A group of organizations—including many of the Plaintiffs here—challenged  
 15 the dredging plan and this Court enjoined the dredging. *Nat'l Wildlife Fed. v. Nat'l*  
 16 *Marine Fisheries Serv.*, 235 F. Supp. 2d 1143, 1162–63 (W.D. Wash. 2002) (Lasnik, J.).  
 17 After a second injunction, the parties settled the litigation, with the Corps agreeing to  
 18 conduct review under the National Environmental Policy Act for a long-term approach  
 19 to sediment management. Compl. Ex. 2 (ECF No. 1). The parties referred to that new  
 20 management approach as a “Programmatic Sediment Management Plan.” *Id.* at 3.

21 The new Plan was intended to create a decision-making framework through  
 22 which sediment accumulation interfering with existing project purposes (including, but  
 23 not limited to, navigation) could be managed and, to the extent possible, prevented. EIS  
 24 at 1-4. To that end, the Corps undertook extensive studies to identify sediment  
 25 accumulation problem areas (EIS at 1-10 to 1-12), as well as analyze sediment sources  
 26 and how sediment moves through the river system and is deposited in the Lower Snake  
 27 River reservoirs (EIS at 1-18 to 1-28). *See* EIS App. M at M-9 to M-36, M-95 to 108.  
 28

1 Through workshops with technical experts, the Corps developed a broad range of  
 2 management measures that could address sediment accumulation problems. EIS at 2-4.

3 As a result of its efforts, the Corps identified twenty-four potential sediment  
 4 management measures across four different categories. EIS at 2-4 to 2-9. The Corps  
 5 created six management frameworks (and a “no action” alternative), each constituting a  
 6 different “toolbox,” and analyzed those frameworks in an Environmental Impact  
 7 Statement. *See* EIS at 2-27 to 2-41. The Corps selected “Alternative 7” as its  
 8 Programmatic Sediment Management Plan. Pls.’ Ex. 21 (ECF No. 14-5). The Plan  
 9 provides “a broad range of dredging, system management, and structural management  
 10 measures” (*id.* at 1), and includes a suite of fourteen potential management measures  
 11 to address sediment accumulation, only one of which is dredging. *See* EIS at 2-29 to 2-  
 12 30 (chart), 2-36 to 2-37. The result is “a proactive adaptive management plan” for  
 13 addressing both immediate, near-term sediment problems that may arise and  
 14 “anticipated future problems before they are critical.” *See* EIS App. A at A-1.

15 The Plan identifies certain conditions under each of the Corps’ management  
 16 purposes that, when met, will trigger either an “immediate” or “future forecast” action  
 17 from the available management measures. *Id.* at A-19 to A-30. With respect to  
 18 navigational purposes, Corps action is triggered when, as a result of sediment  
 19 accumulation, a portion of the navigation channel is less than fourteen feet at  
 20 Minimum Operating Pool<sup>2</sup> and impairs safe commercial navigation or access to  
 21 navigation locks (“immediate need”), or when that scenario is forecasted to occur more  
 22 than once in a five year period (“future forecast need”). *Id.* at A-22. The Plan identifies  
 23 the specific management measures the Corps should consider to remedy an immediate  
 24 or forecasted sediment problem. *See, e.g., id.* at A-21 to A-22.

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26 <sup>2</sup> Specific elevation operating ranges (from sea level) are authorized for the reservoirs  
 27 behind each dams on the Lower Snake River. Vail Decl. ¶ 2. The operating range for the  
 28 Lower Granite Reservoir, for example, is 733 to 738 feet above sea level. Vail Decl. ¶ 2. The  
 lower end of the elevation range is known as the “Minimum Operating Pool” or “MOP.”

1       **II.     Sediment Currently Impairing Navigation**

2           In developing the Programmatic Sediment Management Plan, the Corps  
 3 identified two locations where sediment accumulation in the navigation channel has  
 4 lowered water depth to as low as seven and nine feet and is currently impairing  
 5 navigation. Pls.’ Ex. 22 at 1(ECF No. 14-6). This triggered an immediate need for action  
 6 under the Plan, which the Corps has referred to as “the *Current* Immediate Need  
 7 Action” (to contrast from immediate needs that may arise in the future). *See id.* at 2.  
 8 Thus, Plaintiffs’ motion is not about the entire 140-mile channel, but a very narrow  
 9 action designed to alleviate the current impairments. Those areas total only 141.5 of  
 10 the 33,890 surface acres in the Lower Snake River system. Decl. of Sandra Shelin ¶ 13

11           The first impairment is at the downstream lock approach at Ice Harbor Dam  
 12 near River Mile 9.5.<sup>3</sup> EIS at 2-3; EIS App. L at L-4, L-5 (maps). River turbulence has  
 13 moved large, coarse river cobbles into the navigation channel. EIS at 3-94 to 3-95. This  
 14 has reduced water depth to nine feet at Minimum Operating Pool—five feet less than  
 15 Congress’s specified depth. EIS App. I at I-8. Lock access is critical for navigation, as all  
 16 barges entering or leaving the Snake River system must pass through Ice Harbor Dam.  
 17 EIS at 3-56. Shoaling has narrowed the room for barges to maneuver and created safety  
 18 issues, including recent bottom scrapings. Vail Decl. ¶ 7.

19           The second impairment is 130 river miles upstream of Ice Harbor Dam, where  
 20 sediment falls out of the water column at the confluence of the Snake and Clearwater  
 21 rivers. EIS at 2-3; EIS at 3-94; EIS App. L at L-6, L-7 (maps). Water depths in the  
 22 navigation channel are as shallow as seven feet at Minimum Operating Pool at certain  
 23 locations—only half of Congress’s specified depth. *Id.* at L-5; EIS App. I at I-8. The  
 24 federal navigation channel at the confluence is adjacent, and necessary for safe access  
 25 to the Ports of Clarkston, Washington, and Lewiston, Idaho. EIS at 3-56. The area of  
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27           <sup>3</sup> River mile counts run upstream, which is generally west to east in the Lower Snake River.  
 28 River Mile zero for the Snake River is at its confluence with the Columbia River.

1 the channel at the confluence that is less than fourteen feet at Minimum Operating Pool  
 2 has increased to 54 acres since previous maintenance actions in 2005/2006. Vail Decl.

3 ¶ 4. Navigation has become extremely difficult, and commercial vessels are beginning  
 4 to ground on the bottom of the channel. *See* Vail Decl. ¶ 4.

5 Given the immediate need to reestablish the navigation channel, the Corps  
 6 analyzed alternatives and potential impacts associated with Current Immediate Need  
 7 Action in the Environmental Impact Statement for the Programmatic Sediment  
 8 Management Plan. *See* Pls.' Ex. 22 at 1. On November 14, 2014, the Corps decided to  
 9 take action this winter to address the navigational impairments at the Ice Harbor Dam  
 10 and Clearwater-Snake confluence.<sup>4</sup> *Id.* To reduce any fish entrainment and turbidity,  
 11 the Corps will use a clamshell dredge to remove the impairments and return the  
 12 navigation channel to Congress's specified dimensions. Shelin Decl. ¶ 8. The sediment  
 13 will be loaded onto a barge, transported, and used to create thirteen acres of shallow-  
 14 water habitat for juvenile salmonids at Knoxway Canyon, which is 23 river miles  
 15 downstream from the confluence of the Snake and Clearwater rivers. *See* Pls.' Ex. 22 at  
 16 2, 5-6; EIS App. L at L-16; Shelin Decl. ¶¶ 10-12. On December 12, 2014, the Corps  
 17 issued a notice to proceed to its dredging contractor. Vail Decl. ¶ 10. The contractor will  
 18 need approximately thirty days to mobilize for the project, and dredging is anticipated  
 19 to begin on about January 12, 2014. Vail Decl. ¶ 10. The timing for the dredging is  
 20 driven by an in-water work window of December 15 to March 1, when salmonids are  
 21 less likely to be present. Pls.' Ex. 22 at 5-7; EIS App. L at L-2; Shelin Decl. ¶ 7.

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23 <sup>4</sup> The sediment accumulation problem also extends into the ports at Lewiston and  
 24 Clarkston. Each port submitted a permit application to the Corps under the Clean Water  
 25 Act and the Rivers and Harbors Act for maintenance dredging in the non-federal port  
 26 berthing areas. EIS at xi-xii; EIS App. L at L-2. Water depths in the berthing areas are  
 27 currently as shallow as 7.3 feet at Minimum Operating Pool. EIS App. I at I-8; EIS App. L  
 28 at L-9, L-10 (maps). The Corps' Seattle and Walla Walla District offices granted the permits  
 on November 14, 2014. Vail Decl. ¶ 9 & Attach. B. Though funded by the Ports, dredging  
 will be done by the same contractor and during the same work window as the Corps' work  
 in the federal navigation channel, in accordance with 33 C.F.R. § 336.1(b)(7). Vail Decl. ¶ 9.

## **Statutory Background**

Congress enacted the National Environmental Policy Act to establish a process for federal agencies to consider the environmental impacts of their actions. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). NEPA serves to inform agency decision-makers when reaching a decision, and to inform the public regarding environmental effects. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). “NEPA itself does not mandate particular results, but simply prescribes the necessary process.” *Id.* at 350; *see Native Ecosys. Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012). Agency compliance with NEPA is bounded by a “rule of reason.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004); *see League of Wilderness Defenders-Blue Mts. Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010). Council on Environmental Quality regulations govern implementation of the statute. See 40 C.F.R. §§ 1500–1508.

The Clean Water Act (CWA) establishes a comprehensive program to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve that objective, the CWA prohibits the “discharge of any pollutant”—defined as the addition of any pollutant to the waters of the United States from any point source—except “as in compliance with” specified provisions of the Act. *Id.* § 1311(a). In most cases, regulated entities achieve compliance by obeying the terms of a permit issued under one of the CWA’s two complementary permitting programs, one of which is for discharge of dredged or fill material and is administered primarily by the Corps pursuant to CWA section 404, *id.* § 1344. Section 404 authorizes the Corps to issue individual or general permits for discharges into navigable waters. 33 U.S.C. § 1344(a), (d), (e). Individual permits are issued case-by-case, after a process that involves site-specific documentation and review, opportunity for public hearing, public interest review, and a formal determination. *See* 33 C.F.R. Pts. 323, 325. When authorized by Congress, the Corps also undertakes the construction, operation and

1 maintenance of Federal civil works projects (e.g., maintenance dredging of navigation  
 2 channels) that may involve the discharge of dredge or fill material into waters of the  
 3 United States. In such circumstances, “the Corps does not process and issue permits for  
 4 its own activities.” 33 C.F.R. § 336.1(a). Rather, the Corps’ regulations provide that it  
 5 will “authorize[ ] its own discharges of dredged or fill material by applying all  
 6 applicable substantive legal requirements, including public notice, opportunity for  
 7 public hearing, and application of the section 404(b)(1) guidelines.” *Id.*; *see generally* 33  
 8 C.F.R. Pts. 335–338.

9 **Standard of Review**

10 Issuance of preliminary relief before the merits of a case have been decided is an  
 11 “extraordinary and drastic remedy.” *Munaf v. Geren*, 553 U.S. 674, 690 (2008).  
 12 Plaintiffs correctly state the four-factor test for preliminary injunctive relief and the  
 13 standard that will apply to the Court’s evaluation of the underlying claims. *See* Pls.’  
 14 Mot. for Prelim. Inj. (“Mot.”) 1–2 & n.3 (ECF No. 8). An injunction can only issue,  
 15 however, where a plaintiff makes a “clear showing” and presents “substantial proof”  
 16 that an injunction is warranted. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per  
 17 curiam). This includes a requirement “to demonstrate that irreparable injury is *likely* in  
 18 the absence of an injunction.” *Winter v. Nat’l Res. Def. Council*, 555 U.S. 7, 22 (2008).  
 19 The Ninth Circuit’s “serious questions” standard still requires a plaintiff to  
 20 demonstrate a “substantial case for relief on the merits,” *Leiva-Perez v. Holder*, 640  
 21 F.3d 962, 967 (9th Cir. 2011), and that the other factors tip *sharply* in the plaintiffs’  
 22 favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

23 **Argument**

24 **I. Plaintiffs Have Failed to Demonstrate a Likely Irreparable Harm that  
 25 Would Justify the Extraordinary Remedy of a Preliminary Injunction**

26 Plaintiffs’ motion should be denied because they have not made the requisite  
 27 showing of harm. Plaintiffs must demonstrate an immediate and irreparable harm that  
 28

1 is “*likely*, not just possible.” *Cottrell*, 632 F.3d at 1131 (citing *Winter*, 555 U.S. at 22).  
 2 “Speculative injury cannot be the basis for a finding of irreparable harm.” *In re Excel*  
 3 *Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007). Notably, this Court’s previous  
 4 injunctions related to Corps navigational maintenance on the Lower Snake River  
 5 occurred prior to the Supreme Court’s 2008 *Winter* decision, which overruled the  
 6 standard upon which those injunctions were issued. *See Nat’l Wildlife Fed’n*, 235 F.  
 7 Supp. 2d at 1161 (assessing “possibility of irreparable injury”).

8 In their present motion, Plaintiffs posit, based upon the declaration of David  
 9 Statler, that the Current Immediate Need Action “will likely result in irreparable  
 10 harm” to lamprey.<sup>5</sup> Mot. at 22–23; Decl. of David Statler (“Statler Decl.”) ¶¶ 26–37  
 11 (ECF No. 10). Mr. Statler opines that there is “a high likelihood to harm or kill  
 12 individual lamprey through dislodgement and downstream movement of juvenile  
 13 lamprey caused by removal of dredge material or placement of dredge spoils in areas  
 14 where juvenile lamprey are present; and through imbedding or smothering in dredge  
 15 material removal or placement.” *Id.* ¶ 37.

16 The problem is that none of the data Mr. Statler relies upon even facially  
 17 support his conclusion. The planned dredging is to occur at River Mile 9.5 (Ice Harbor  
 18

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19  
 20 <sup>5</sup> Plaintiffs argue in passing that the “take” of even one listed salmon or steelhead is an  
 21 irreparable harm. *See Mot.* at 23–24 & n.26. They are incorrect as a matter of law. Courts  
 22 have consistently held that harm to an ESA-listed species is measured at the species level—  
 23 an injunction can only be justified if there is irreparable harm to the species. *See Nw. Envtl.*  
 24 *Def. Ctr. v. U.S. Army Corps of Eng’rs*, 817 F. Supp. 2d 1290, 1314–16 (D. Or. 2011); *see also*  
 25 *NWF v. NMFS*, 422 F.3d 782, 796 (9th Cir. 2005) (need to show “irreparable harm to a  
 26 threatened species”); *Humane Soc’y v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (finding  
 27 death of over 2,000 listed salmon was not irreparable harm). Plaintiffs have not presented  
 28 any proof that a species as a whole is likely to be harmed. To the contrary, the Biological  
 Opinion upon which they rely actually finds that the Current Immediate Need Action is not  
 likely to jeopardize the species. Pls.’ Ex. 19 at 3 (summary page). The effort to base an  
 injunction on injury to salmon or steelhead must therefore be denied. *Defenders of Wildlife*  
*v. Salazar*, 812 F. Supp. 2d 1205 (D. Mont. 2009). Similarly, the Supreme Court has  
 rejected Plaintiffs’ contention (Mot. at 24) that irreparable harm arises solely from a  
 violation of NEPA. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157–158 (2010).

1 Dam) and upstream from River Mile 138 (the confluence). *See* EIS App. L at L-2. But  
 2 Mr. Statler's data include no lamprey counts downstream of River Mile 76 (*sixty-six*  
 3 miles from Ice Harbor Dam) or upstream of River Mile 134 (four miles from the  
 4 confluence). *See* Attach. to Statler Decl; Decl. of Marvin Shutters ¶ 13. The data do not  
 5 show any lamprey to be present where the Corps will actually be dredging. *See* Statler  
 6 Decl. ¶¶ 26, 27 (noting collection locations). All told, Mr. Statler's data reflect only  
 7 seventeen juvenile lamprey in the entirety of Lower Granite Reservoir. *See* Attach. to  
 8 Statler Decl; Shutters Decl. ¶¶ 12, 13. That is significant given that the planned  
 9 dredging and disposal areas cover just 1.5 percent of the 8,900-acre reservoir. Shutters  
 10 Decl. ¶ 9. Even if the data reflected a local lamprey presence, harm to any individual  
 11 lamprey—a species that is not listed as threatened or endangered under the  
 12 Endangered Species Act—would not justify a preliminary injunction. *See Nw. Env'tl.*  
 13 *Def. Ctr.*, 817 F. Supp. 2d at 1314–16 (finding harm to individuals insufficient, even for  
 14 threatened and endangered species). Plaintiffs present no evidence that the species is  
 15 at risk; to the contrary, adult lamprey counts have been increasing. Shutters Decl. ¶ 15.

16 Mr. Statler also wrongly focuses on migratory juvenile lamprey. *See* Statler Decl.  
 17 ¶ 37; Shutters Decl. ¶ 13. Migratory juvenile lamprey are not found in sediment.  
 18 Shutters Decl. ¶ 13. Instead, they are mobile in the water column and, like adult  
 19 lamprey, have the ability to retreat from dredging and disposal activities. Shutters  
 20 Decl. ¶ 9, 13. Indeed, the sampling method for the data upon which Mr. Statler relies  
 21 was for the collection of salmon (not lamprey) in the water column (not sediment).  
 22 Shutters Decl. ¶ 13. Here, dredging and disposal will occur between now and March 1,  
 23 which avoids adult lamprey migration and the majority of migratory juvenile lamprey  
 24 migration. Shutters Decl. ¶ 9

25 Rather than migratory juveniles, the proper focus here should be larval  
 26 juveniles, which do live in sediment. Shutters Decl. ¶ 13. Unlike Mr. Statler, the Corps  
 27 undertook extensive site-specific surveys to determine whether any larval juvenile  
 28

1 lamprey could be entrained in the dredged material or buried at the disposal site.  
 2 Shutters Decl. ¶¶ 5–6. Not a single larval juvenile lamprey was found at any of the  
 3 samples points. Shutters Decl. ¶¶ 6, 8. The facts here do not support a conclusion that  
 4 Pacific lamprey are likely to be harmed. At most, there is a possibility of harm, and that  
 5 possibility exists only if lamprey are present in the work areas—a conclusion not  
 6 supported by facts. Shutters Decl. ¶ 16. A mere possibility of harm—which, in this case,  
 7 is speculative at best—cannot serve as the basis for preliminary injunctive relief.  
 8 *Winter*, 555 U.S. at 22.

9 **II. The Corps’ Range of Alternatives for the Current Immediate Need  
 10 Action Was Reasonable and Therefore Complied with NEPA**

11 NEPA requires federal agencies to explore and evaluate alternatives to their  
 12 proposed actions. 40 C.F.R. § 1502.14(a) (emphasis added). But an EIS “need not  
 13 consider an infinite range of alternatives, only reasonable and feasible ones.” *City of*  
*14 Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). An  
 15 alternative’s reasonableness is governed by a given project’s purpose and need. *Id.* at  
 16 1155. The Ninth Circuit affords agencies “considerable discretion to define the purpose  
 17 and need.” *Friends of Se. Alaska’s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir.  
 18 1998). A reasonable purpose and need statement must be upheld. *See Citizens Against*  
*Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

20 The Corps’ purpose and need for the Current Immediate Need Action meets that  
 21 reasonableness standard. Sediment accumulation is currently impairing navigation at  
 22 the downstream approach to Ice Harbor Dam’s lock and the confluence of the Snake  
 23 and Clearwater Rivers. EIS at 1-5. The Corps therefore identified a purpose and need  
 24 “to re-establish the federal navigation channel to the congressionally authorized  
 25 dimensions . . . .” EIS at 1-4. The Corps based that objective on Congress’s  
 26 authorization for the navigation channel: “the Columbia-Snake River barge navigation  
 27 project shall be established as fourteen feet and two hundred and fifty feet,  
 28

1 respectively, at minimum regulated flow.” 76 Stat. at 1193 (emphasis added); *see* EIS at  
 2 1-8 to 1-9, App. G at G-84. The Corps properly used the statutory directive to guide its  
 3 purpose and need. *See Honolulu Traffic.com v. Fed. Transit Admin.*, 742 F.3d 1222,  
 4 1230 (9th Cir. 2014); *Westlands Water Dist. v. U.S. Dep’t of the Interior*, 376 F.3d 853,  
 5 866 (9th Cir. 2004).

6 Plaintiffs indirectly attack the purpose and need by arguing that Congress,  
 7 despite its use of the word “shall,” did not intend for the Corps to maintain the  
 8 navigation channel at 14 feet. *See* Mot. at 6–8. But the argument fails because the  
 9 question is one of statutory interpretation. Even if Congress had been less clear, the  
 10 Corps’ reasonable interpretation would be entitled to deference under the *Chevron*  
 11 standard.<sup>6</sup> *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 & n.4 (2009). For  
 12 Plaintiffs to prevail on their argument that the Corps’ purpose and need was  
 13 unreasonable, Congress would have had to explicitly *prohibit* the channel from being  
 14 maintained at 14 feet by 250 feet. Even Plaintiffs do not make that argument. Indeed,  
 15 Congress has continued to authorize Corps action to maintain the navigation channel  
 16 at the authorized dimensions. *See, e.g.*, Water Resources Development Act of 1992, Pub.  
 17 L. 102-580, § 109(a), 106 Stat. 4797, 4816–17 (Oct. 31, 1992).

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19<sup>6</sup> Plaintiffs’ strained interpretation of the legislative history here is the same one they made  
 20 in their comments on the Draft EIS. The Corps explained why that interpretation is  
 21 incorrect. *See* EIS App. G at G-83 to G-84; *see also* Swanson Decl. Ex. 3 at 16, 18  
 22 (recommending dimension). Plaintiffs’ contention that Congress did not intend the channel  
 23 to be navigable year-round (Mot. at 6, 7 n.12) incorrectly derives from early (1938) plans  
 24 involving a 5-foot channel that would be blocked by ice two months of the year. EIS App. G  
 25 at G-83; Pls.’ Ex. 1 at 9. The House report upon which they rely pre-dates the 1962 Flood  
 26 Control Act by twenty-four years. *See id.* Plaintiffs’ argument also makes little sense:  
 27 suspending navigation for part of the year does not change the sediment depth; whenever  
 navigation resumed, the channel would still need to be navigable, which, in this case,  
 Congress has defined as 14 feet at Minimum Operating Pool. EIS App. G at G-83, G-85.  
 Ironically, the Dalles Dam project Plaintiffs use as an analogy actually undercuts their  
 argument. The authorizing statute does not contain a directive as to channel dimensions.  
*See* Flood Control Act of 1950, Pub. L. 81-516, § 204, 64 Stat. 163, 179–80 (May 17, 1950).

1       With its purpose and need established, the Corps turned to its Programmatic  
 2 Sediment Management Plan to identify reasonable alternatives for the Current  
 3 Immediate Need Action. The Plan identifies two management options when an  
 4 immediate need action is triggered for navigation. The first is changes in reservoir  
 5 operations.<sup>7</sup> EIS App. A at A-23. But those measures are only temporary—sediment  
 6 continues to accumulate and the Corps can only raise the reservoir so high given design  
 7 and structural limitations. *See* EIS at 2-20; Pls.’ Ex. 22 at 4. Thus, the second option for  
 8 a navigational immediate need action is to remove the impairing sediment. EIS App. A  
 9 at A-23. Plaintiffs argue that the range of alternatives is unreasonable because it  
 10 includes only those two possibilities. Mot. at 4–6, 8–10. Plaintiffs are wrong.<sup>8</sup>

11       First, Plaintiffs ignore that agencies “need not . . . discuss alternatives . . . which  
 12 are infeasible, ineffective, or inconsistent with the basic policy objectives . . .” *N.*  
 13 *Alaskan Envtl. Center v. Kemphorne*, 457 F.3d 969, 978 (9th Cir. 2006). In assessing  
 14 potential management measures as part of the Programmatic Sediment Management  
 15 Plan, the Corps concluded that non-dredging management measures would not  
 16 effectively reestablish the channel at Congress’s statutorily-prescribed dimensions once  
 17 sediment is already impairing navigation. EIS at 2-41. Other management measures  
 18 would therefore not meet the purpose and need for the Current Immediate Need Action.  
 19 *See Id.* Courts have consistently upheld alternatives analyses where only one  
 20 alternative would meet the purpose and need for the action. *See, e.g., Earth Island Inst.*  
 21 *v. U.S. Forest Serv.*, 697 F.3d 1010, 1021–23 (9th Cir. 2012).

22 \_\_\_\_\_  
 23 <sup>7</sup> To provide for safe navigation, the Corps has been increasing water releases at Ice Harbor  
 24 Dam to provide adequate depth when barges enter or exit, and increasing water depth in  
 25 Lower Granite Reservoir to an elevation above the Minimum Operating Pool. EIS at 1-14 to  
 26 1-15. Thus, as NEPA requires, the Corps analyzed changes in reservoir operations as the  
 27 “no action” alternative to the proposed Current Immediate Need Action. *See* EIS at 2-41.

28 <sup>8</sup> It is inaccurate to say the Corps considered only two alternatives for the Current  
 29 Immediate Need Action. The Corps also considered several dredging design alternatives  
 (i.e., where and how to dispose of the dredge spoils). *See* EIS App. L at L-13 to L-47.

1       Second, contrary to Plaintiffs' contention, the Corps did analyze why the other  
 2 management measures would not effectively meet the purpose and need. *See* Mot. at 5.  
 3 The Corps analyzed the effectiveness of various management measures on sediment.  
 4 *See* EIS App. F at Pt. 1, F-19 to F-21 (summarizing findings of 600 page report). The  
 5 alternatives assessment for the Programmatic Sediment Management Plan discussed  
 6 whether each would be feasible and effective in scenarios where an immediate need for  
 7 action had arisen.<sup>9</sup> For example, the EIS notes that, to be effective at scouring impeding  
 8 sediment, a drawdown of reservoir levels would, among presenting other issues, need to  
 9 occur between late-April and mid-June (to take advantage of spring flows); last up to  
 10 six weeks; and lower the reservoir depth up to fifteen feet below Minimum Operating  
 11 Pool. EIS at 2-20. Any drawdown would also need to rely on adequate high-flow  
 12 prediction and modeling, requiring sufficient lead time to plan, design, and implement.  
 13 *Id.* Drawdowns are also not targeted; they affect the entire reservoir and mobilize  
 14 sediments over a vast area, rather than only the location where sediment is actually  
 15 impairing Corps project purposes. *See id.*

16       The Corps also provided explanations for agitating sediment (EIS at 2-19);  
 17 reconfiguring or relocating facilities (EIS at 2-21); upland sediment reduction (EIS at 2-  
 18 39); and in-river structures like bendway weirs (EIS at 2-17 to 2-18). When Plaintiffs  
 19 suggested the light-loading of barges was a potential alternative, the Corps explained  
 20 why that solution was not reasonable or an "alternative." EIS App. G at G-85. The  
 21

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22       <sup>9</sup> The Corps' discussion on alternatives for the Current Immediate Need Action thus only  
 23 focused on those of the alternatives that would be effective for the action in question. *See*  
 24 EIS at 2-41 to 2-42. Plaintiffs' argument that the Corps cannot rely on its Plan-level  
 25 explanations because they occurred primarily in the discussion of the Plan is incorrect. *See*  
 26 Mot. at 9. Plaintiffs themselves acknowledge that "alternatives for a site-specific action  
 27 must be considered *somewhere*." *Id.* Here, they are in the very EIS that Plaintiffs challenge.  
 28 Plaintiffs' assertion that the alternatives analysis is faulty because the EIS was not  
 released five years earlier is even farther afield. *See id.* at 6. The fact that the Corps took  
 longer than expected to thoroughly study the sediment problem—a study Plaintiffs  
 themselves requested—does not support a conclusion that the Corps' study was insufficient.

1 Corps reiterated these explanations in its decision to apply the Plan and undertake the  
 2 Current Immediate Need Action. Pls.' Ex. 22 at 4–5. Though some non-dredging  
 3 measures in the Plan may, after analysis, present longer-term solutions to address or  
 4 prevent navigation-impairing sediment accumulation, only dredging can effectively  
 5 address accumulation once navigation is actually impaired, as it is here. *See* EIS App. A  
 6 at A-23 to A-24.

7 Plaintiffs' analogy to the Court's 2002 conclusion on the Corps' Dredge Material  
 8 Management Plan also fails. *See* Mot. at 4 (citing *Nat'l Wildlife Fed'n*, 235 F. Supp. 2d  
 9 at 1154–58). The 2002 Plan was a twenty-year plan to address dredged material  
 10 disposal for future dredging. *Nat'l Wildlife Fed'n*, 235 F. Supp. 2d at 1152–53. The  
 11 current action, by contrast, is focused on currently-existing impairments. *See* Pls.' Ex.  
 12 22. Like Plaintiffs' present motion, the plaintiffs' second motion for a preliminary  
 13 injunction in the prior litigation similarly involved a single Corps action. *See* Compl.  
 14 Ex. 1 at 5. In that context, Judge Lasnik rejected the same alternatives arguments that  
 15 Plaintiffs bring here. *See id.* at 15–18. "So long as 'all reasonable alternatives' have  
 16 been considered and an appropriate explanation is provided as to why an alternative  
 17 was eliminated, the regulatory requirement is satisfied." *Native Ecosys. Council*, 428  
 18 F.3d at 1246; *see* 40 C.F.R. § 1502.14(a). The EIS includes thirty-one pages of discussion  
 19 on the practicality and effectiveness of various management measures. EIS at 2-12 to 2-  
 20 43. Plaintiffs have not presented a serious question going to their alternatives claim.

21 **III. The Corps Took the Requisite Hard Look at Potential Impacts to Pacific  
 22 Lamprey**

23 When reviewing an agency's impact analysis under NEPA, a court's "role is to  
 24 ensure that the agency has taken a 'hard look' at potential effects. *Churchill Cnty. v.*  
 25 *Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001) (citation omitted). This involves "a  
 26 pragmatic judgment whether the EIS's form, content and preparation foster both  
 27 informed decision-making and informed public participation." *Id.* at 1071 (internal  
 28

1 quotation marks and citations omitted). Here, the Corps took the requisite hard look at  
 2 potential impacts to Pacific lamprey.

3 The Corps reviewed available literature on lamprey behavior and location. EIS  
 4 at 3-15 to 3-16. There is “no evidence that [adult] Pacific lamprey have used or  
 5 currently use the mainstream Snake River for spawning or rearing.” EIS at 3-16. The  
 6 Corps recognized, however, that use of the Lower Snake River’s mainstem by larval  
 7 juvenile lamprey is largely unknown. *See id.* The agency therefore took 646 samples at  
 8 24 survey sites in July and September of 2011, including numerous samples from the  
 9 confluence of the Snake and Clearwater rivers and the planned disposal area. *Id.*;  
 10 Shutters Decl. ¶¶ 4–6 & Attach. A & B. No lamprey were found. EIS at 3-16. The Corps  
 11 acknowledged that the survey, given its scope and nature, did not completely foreclose  
 12 that some larval juveniles could be present during dredging and disposal. *Id.* The Corps  
 13 therefore concluded that larval lamprey may be present during dredging and disposal  
 14 and, if so, “may be impacted during the proposed near-term action.”<sup>10</sup> EIS at 4-12, 4-15,  
 15 4-22; EIS App. G at G-139 to G-140; *see id.* at G-168. But the Corps noted that the  
 16 limited amount of rearing habitat makes it unlikely that larval juveniles exist “in  
 17 moderate or high numbers.” EIS at 3-16. This was not an unsupported, generalized  
 18 statement of the possible. *See Mot.* at 10, 12–13. It was the Corps’ conservative  
 19 conclusion based upon its independent study and survey.

20 Plaintiffs contend that the Corps “failed to identify, evaluate or disclose [the  
 21 lamprey’s] current status in the project area . . . .” *See Mot.* at 11. This, of course,  
 22 ignores the Corps’ extensive survey to identify any lamprey present in the sediment at  
 23 the dredging and disposal sites. *See EIS* at 3-16; Shutters Decl. Attach. C. Given the  
 24 action at issue, the Corps focused its survey efforts on larval juvenile lamprey, which

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25  
 26 <sup>10</sup> The conservative conclusion that there *may* be impacts to lamprey should not be confused  
 27 with Plaintiffs’ burden to demonstrate a *likely* irreparable harm. The Ninth Circuit has  
 28 been clear that mere impacts, even those that are adverse, do not amount to a finding of  
 irreparable harm. *See Humane Soc’y*, 523 F.3d at 991.

1 live in sediment. Shutters Decl. ¶¶ 3–4. That focus was consistent with NEPA’s purpose  
 2 to concentrate study on the most significant aspects of environmental issues. 40 C.F.R.  
 3 § 1501.1(d). The Corps’ survey work did not find any lamprey. EIS at 3-16; Shutters  
 4 Decl. ¶¶ 6, 8. Given the Corps’ survey, Plaintiffs’ argument is really a disagreement  
 5 with the methodology the Corps relied upon for its field work. *See* EIS App. G at G-139  
 6 to G-140 (responding to comment that a different technique would have been  
 7 preferable). That argument does not have a likelihood of success: courts are “at [their]  
 8 most deferential’ when reviewing scientific judgments and technical analyses within  
 9 the agency’s expertise under NEPA.” *Native Ecosys.*, 697 F.3d at 1051 (citation  
 10 omitted). In fact, the methodology the Corps chose was intended to limit effects on the  
 11 lamprey by avoiding actually handling any individuals. Shutters Decl. ¶ 7.

12 Further, it is unclear what an additional study would have added to the NEPA  
 13 process here. EIS App. G at G-139 to G-140. Based on existing information, including  
 14 its own survey, the Corps conservatively disclosed that the Current Immediate Need  
 15 Action may impact larval juvenile lamprey if, contrary to the Corps’ survey, they  
 16 happen to be present. Plaintiff Nez Perce Tribe actually *agreed* with the Corps’ lamprey  
 17 conclusions. Pls.’ Ex. 17 at 4 (ECF No. 14-1). The Corps’ assessment of Pacific lamprey  
 18 informed the public and agency decision-makers regarding possible impacts.

19 **IV. The Corps’ Discussion of Impacts from Climate Change Properly  
 20 Identified the Uncertainty of Potential Future Effects**

21 Plaintiffs’ argument that the Corps failed to take a hard look at climate change’s  
 22 potential effect on sediment contribution also largely ignores the EIS. *See* Mot. at 13–  
 23 14. The Corps considered studies on sediment yield, loading, accumulation, and erosion,  
 24 including in relation to climate change. *See* EIS at 1-24 (table listing studies); EIS App.  
 25 F at Pt. 3, F-173 to F-175; EIS App. D. The EIS summarized the findings from those  
 26 studies (EIS at 1-21 to 1-28), and includes an entire subsection on potential climate-  
 27  
 28

1 based changes to sediment loading and transport. EIS at 4-94 to 4-99. Plaintiffs do not  
 2 include that subsection among their many EIS extracts. *See* Pls.' Ex. 9 (ECF No. 12-3).

3 Contrary to Plaintiffs' argument, the Corps did acknowledge that its  
 4 "management of sediment . . . may be affected by climate change." EIS at 4-94 to 4-95;  
 5 EIS App. G at G-78 to G-79; Swanson Decl. Ex. 2 at 45 (Comment 20320). The EIS  
 6 notes that wildfire in the watershed has been increasing and that fire-affected areas are  
 7 a primary sediment contributor, which may signal an increase in sediment *loading*  
 8 from forested watersheds. EIS at 1-22, 1-25, 1-28. But "whether or not these conditions  
 9 would affect sediment *transport and accumulation* when considered in combination  
 10 with changes in precipitation and tributary flows cannot be reasonably predicted at this  
 11 time." EIS at 4-96 (emphasis added).

12 Plaintiffs also take issue with a Corps statement that "present basin climactic  
 13 conditions might already provide the maximum long-term sediment yield conditions,"  
 14 arguing that it is inaccurate because "discharge is based on many factors, including  
 15 rainfall and resisting vegetation force." Mot. at 13. But the Corps acknowledged the  
 16 very complexity that Plaintiffs claim it ignored. *See* EIS at 4-96, 4-97. Indeed, because  
 17 of that complexity the Corps concluded that an accurate assessment of effects on  
 18 sediment yield and transport from changing climate conditions would require long-term  
 19 monitoring and adaptive management. EIS at 4-98; EIS App. G at G-78 to G-79.

20 Plaintiffs argue that the Corps should have nonetheless incorporated "likely  
 21 future conditions" into its impacts analyses. Mot. at 13–14. Plaintiffs ignore the  
 22 uncertainty surrounding localized impacts from climate change. "[A]ccurately  
 23 predicting how those future conditions affect sediment accumulation in the [Lower  
 24 Snake River] is not currently realistic or feasible." EIS App. G at G-79. "Because  
 25 current science does not allow for the specificity demanded by the [Plaintiffs]," NEPA  
 26 did not require the Corps to identify specific climate effects. *WildEarth Guardians v.*  
 27 *Bureau of Land Mgmt.*, 8 F. Supp. 3d 17, 36 (D.D.C. 2014) (internal citation and  
 28

1 quotations omitted).<sup>11</sup> The Corps was disclosing existing science, not ignoring it.

2 Plaintiffs have not presented serious questions as to their climate change claim.

3 **V. Plaintiffs Economics-Based Claim Will Fail Because NEPA Does Not**  
**4 Require Cost-Benefit Analyses**

5 Plaintiffs have not presented a serious question going to the merits of their  
6 economic analysis claim. *See* Mot. at 14–21. Plaintiffs are correct that the “human  
7 environment” under NEPA can include economic considerations. *See* 40 C.F.R. §  
8 1508.14. Here, the Corps considered what socioeconomic effects the Current Immediate  
9 Need Action may have. The EIS discussed how the navigation channel is used to  
10 transport goods (EIS at 3-48 to 3-57), and qualitatively assessed how the Current  
11 Immediate Need Action could affect that transportation sector. *See* EIS at 4-37 to 4-41.  
12 Plaintiffs take issue with the scope of the Corps’ assessment. They argue that NEPA  
13 required the Corps to analyze the full costs and benefits of the Current Immediate Need  
14 Action, and that the Corps’ information is misleading. *See* Mot. at 14–21. Neither  
15 argument presents serious questions going to the merits.

16 First, Plaintiffs are wrong as a matter of law that NEPA requires a cost-benefit  
17 analysis.<sup>12</sup> The Ninth Circuit made that clear forty years ago. *Trout Unlimited v.*  
18 *Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974) (noting that only question is whether EIS  
19 is sufficient to aid decision-making and inform the public). NEPA’s implementing  
20 regulations echo that conclusion: “the weighing of the merits and drawbacks of the

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21  
22 <sup>11</sup> Unlike many NEPA climate change claims, Plaintiffs are not arguing that the Corps  
23 failed to consider the *effects of its action* on climate change, but that the Corps failed to  
24 consider the *effects of climate change* on its action. The uncertainty, however, remains.

25 <sup>12</sup> As Plaintiffs’ brief and economic study make clear, they are not seriously taking issue  
26 with the economic *effects* from the action, despite their attempt to use that label. *See* 40  
27 C.F.R. § 1508.8 (defining “effects” as those caused by the action). Instead, they are claiming  
28 that NEPA required the Corp to provide an economic *justification* for continuing to  
maintain the navigation channel. *See, e.g.*, Mot. at 14 (arguing Corps failed to examine  
whether “channel is economically worth maintaining”). NEPA includes no such  
requirement. Thus, to a large extent, Plaintiffs have failed to state a NEPA claim.

various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations.” 40 C.F.R. § 1502.23. Instead, the regulations require disclosure of a cost-best analysis *if* one is undertaken. *See City of Sausalito v. O’Neill*, 386 F.3d 1186, 1214–16 (9th Cir. 2004) (citing § 1502.23). The Corps did not undertake a detailed cost-benefit analysis for the Current Immediate Need Action. EIS App. G at G-67; Decl. of James K. Fredericks ¶ 4. Nor was such a study necessary. Congress has already made that assessment in its explicit and repeated direction to maintain navigation on the Lower Snake River. *See Trout Unlimited*, 509 F.2d at 1287 & n.5; EIS App. G at G-67.

Rather than a cost-benefit analysis, the Corps used economic indicators to determine whether the existing navigational civil works projects remained in use and therefore warrant continued maintenance. *Id.* This assessment was not because it was necessary to compare alternatives under NEPA, but to follow internal Corps guidance (which Plaintiffs do not challenge).<sup>13</sup> See EIS App. G at G-67; 40 C.F.R. § 1502.23; Fredericks Decl. ¶ 5. The Corps considered that over three million tons of cargo transited the Lower Snake River navigation system in 2012, an increase of 500,000 tons from 2011. Swanson Decl. Ex 2 at 25–26 (Comment 20422). That continued use, and the transportation savings realized when materials are shipped by barge, warrant continued maintenance. EIS at 3-55; Fredericks Decl. ¶ 6. Even if this had been a cost-benefits analysis (which it was not), the Corps would have complied with NEPA by disclosing the information. See 40 C.F.R. § 1502.23.

Second, the Corps' disclosure of its chosen economic indicators cannot be deemed "misleading." The Corps noted its sources; disclosed the conclusions it was drawing

<sup>13</sup> The fact that the Corps may have undertaken a cost-benefit analysis in the 2002 Dredged Material Management Plan is irrelevant here. See Mot. at 16 n.18 (citing Pls.’ Ex. 4). NEPA does not require cost-benefit analyses. In any event, other evidence before the Corps contradicts Plaintiffs’ contention (Mot. at 17) that shipping volumes and the benefits of maintaining the channel will decline. See Letter from Dr. Eric Fruits (Swanson Decl. Ex. 2).

1 from the information; and provided those citations and numbers in response to public  
 2 requests. *See* EIS App. G at G-67 to G-68; EIS at 3-55; Swanson Decl. Ex. 2 at 26, 28  
 3 (Comments 20422, 20430). Plaintiffs argue that the Corps' shipping estimate relied  
 4 upon stale information from a 2002 feasibility report. Mot. at 17–18. Age alone,  
 5 however, does not invalidate information considered in the NEPA process. *See League*  
 6 *of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 763 (9th Cir. 2014). And  
 7 Plaintiffs do not point to any newer or better report the Corps should have considered.  
 8 In any event, the Corps acknowledged the report's date and compared its numbers to  
 9 2012 tonnage levels. Swanson Decl. Ex. 2 at 26. The 2012 numbers still showed  
 10 significant use of the navigation system that warranted continued maintenance.<sup>14</sup>  
 11 Swanson Decl. Ex. 2 at 26, 28; Fredericks Decl. ¶ 6.

12 Plaintiffs also argue that the Corps erred in looking at transportation savings  
 13 and total tonnage for the entire Lower Snake River, rather than just at the confluence  
 14 of the Snake and Clearwater rivers. Mot. at 18–19. This presents nothing more than a  
 15 methodological disagreement; the Corps' chosen methodology is entitled to deference.  
 16 *See Weldon*, 697 F.3d at 1051, 1052, 1055–56; *Nat'l Wildlife Fed'n*, 235 F. Supp. 2d at  
 17 1158–59. The concern also makes little sense. Congress has directed the Corps to  
 18 maintain navigation on the entire River, not just select portions of it. Plaintiffs have  
 19 not shown serious questions going to their economic analysis claim.

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<sup>14</sup> Plaintiffs argue the EIS is faulty because it did not foretell navigation use indicators for specific future actions. *See* Mot. at 19–20. Plaintiffs' economic report focuses on the selection of the Corps' Programmatic Sediment Management Plan, not the Current Immediate Need Action. *See* Pls.' Ex. 16 Attach. at 6–8. Though the Corps did generally look to economic indicators in developing the Plan, the Plan itself does not authorize any action, dredging or otherwise. Pls.' Ex. 21 at 5. Any claim related to economic indicators for potential future Corps actions is not ripe. Such a claim would also not present a basis to enjoin the Current Immediate Need Action, which is the subject of Plaintiffs' motion.

1     **VI. The Corps Fully Complied with Applicable Clean Water Act Regulations**  
 2     **In Authorizing Discharges Associated with the Maintenance Dredging**  
 3     **Challenged by Plaintiffs**

4       Plaintiffs contend that the Corps' authorization of the Current Immediate Need  
 5     Action is defective because the Corps did not perform a "public interest review"  
 6     pursuant to 33 C.F.R. § 320.4(a). Mot. at 21–22. Plaintiffs cannot prevail on this claim  
 7     because § 320.4(a) applies only to processing of CWA section 404 permit applications,  
 8     and does not apply to Army civil works maintenance activities involving projects that  
 9     have been authorized by Congress.

10      Acting pursuant to its authority to regulate discharges of dredged and fill  
 11     material into navigable waters, 33 U.S.C. § 1344(a), (d), (e), the Corps issued two  
 12     separate sets of regulations: (1) requirements that apply to permit applications, 33  
 13     C.F.R. parts 321 through 330; and (2) requirements that apply to Corps authorization of  
 14     its own discharges, 33 C.F.R. parts 335 through 338.

15      The regulations found at 33 C.F.R. parts 320 through 330 "prescribe[ ] the  
 16     statutory authorities, and general and special policies and procedures applicable to the  
 17     review of applications for Department of the Army (DA) permits for controlling certain  
 18     activities in waters of the United States or the oceans." 33 C.F.R. § 320.1(b). Those  
 19     regulations include the public review provision, 33 C.F.R. § 320.4(a), that Plaintiffs  
 20     argue applies to the current immediate need maintenance dredging and disposal  
 21     challenged in this case. However, § 320.4 expressly states that its requirements, "shall  
 22     be applicable to the review of all applications for DA permits." Section 320.4 does not,  
 23     by its own terms, apply to Corps discharges of dredged material. Moreover, "the "Corps  
 24     does not process and issue permits for its own activities." 33 C.F.R. § 336.1(a).

25      The regulations applicable in this case are codified at 33 C.F.R. parts 335  
 26     through 338, and are "applicable to the Corps of Engineers when undertaking operation  
 27     and maintenance activities at Army Civil Works projects." 33 C.F.R. § 335.3. Those  
 28     regulations "prescribe[ ] the practices and procedures to be followed by the Corps of

1 Engineers to ensure compliance with the specific statutes governing Army Civil Works  
 2 operations and maintenance projects involving the discharge of dredged or fill material  
 3 into waters of the U.S. . . . .” 33 C.F.R. § 335.1. Although the Corps does not issue  
 4 permits for its own activities, “the Corps authorizes its own discharges of dredged or fill  
 5 material by applying all applicable substantive legal requirements, including public  
 6 notice, opportunity for public hearing, and application of the section 404(b)(1)  
 7 guidelines.”<sup>15</sup> 33 C.F.R. § 336.1(a). Plaintiffs contend that § 336.1(a) makes the public  
 8 interest review requirements contained in § 320.4(a) applicable to Corps maintenance  
 9 dredging that has been authorized by Congress. Mot. at 27. However, the Corps  
 10 expressly addressed this proposition when it promulgated 33 C.F.R. parts 335 through  
 11 338 in 1988, and explained that such regulations that apply to the general public (such  
 12 as the public interest review) do not apply to the Corps’ operation and maintenance  
 13 activities because Congress—not the Corps—determines that such activities are in the  
 14 public interest:

15 The Corps is subject to the same Federal environmental laws and  
 16 regulations as the general public even though the Corps does not issue a  
 17 permit document to authorize its activities. This rule reflects the  
 18 requirement to meet the same standards (see § 336.1(a)). There is, however,  
 19 a somewhat different perspective between projects undertaken by the  
 20 general public and Corps operations and maintenance activities. When a  
 21 private entity proposes to perform work requiring a Corps permit, the  
 22 Corps must decide whether tha[t] work would be contrary to the public  
 23 interest. In contrast, this rule [33 C.F.R. parts 335 through 338] applies to  
 24 operation and maintenance of Federal projects which have already been  
 25 determined by the Congress to be in the public interest.

26 Final Rule for Operation and Maintenance of Army Corps of Engineers Civil Works  
 27 Projects Involving the Discharge of Dredged Material Into Waters of the U.S. or Ocean  
 28 Waters, 53 Fed. Reg. 14,902, 14,903 (Apr. 26, 1988). The Corps thus does not interpret

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26  
 27 <sup>15</sup> Plaintiffs do not allege that the Corps has failed to satisfy the requirements of the  
 28 404(b)(1) guidelines, which aim to fulfill the goal of the CWA though “control of discharges  
 of dredged or fill material.” 40 C.F.R. § 230.1.

1       § 336.1(a) to make the public interest review provisions of §320.4(a) to maintenance  
 2 dredging. An agency's interpretation of its own regulations is controlling unless it is  
 3 "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452,  
 4 461 (1997) (citation omitted). This is particularly true where, as here, "there is no  
 5 indication that its current view is a change from prior practice or a *post hoc* justification  
 6 adopted in response to litigation." *Decker v. Nw. Env'l. Def. Ctr.*, 133 S. Ct. 1326, 1337  
 7 (2013).

8       The Corps' 1988 rulemaking decision not to include a public interest review  
 9 process in its regulations pertaining to its maintenance projects is also entitled to  
 10 deference. Where, as here, an agency with delegated rulemaking authority promulgates  
 11 a regulation interpreting a provision of the statute it administers, this Court reviews  
 12 that interpretation pursuant to the deferential standard set out in *Chevron U.S.A. Inc.*  
 13 *v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). At step one of the  
 14 *Chevron* inquiry, the Court evaluates whether congressional intent regarding the  
 15 meaning of the text in question is clear from the statute's plain language. *See Nat'l*  
 16 *Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005). If it is,  
 17 the Court must give effect to that meaning. *Id.* If the statute is ambiguous, the Court  
 18 then proceeds to step two. Under step two, the Court must determine if the agency's  
 19 interpretation of the statute is "a reasonable policy choice for the agency to make."  
 20 *Brand X*, 545 U.S. at 986 (quoting *Chevron*, 467 U.S. at 845); *see N. Cal. River Watch v.*  
 21 *Wilcox*, 633 F.3d 766, 772–73 (9th Cir. 2011). The agency's interpretation is controlling  
 22 "if it is a reasonable interpretation of the statute—not necessarily the only possible  
 23 interpretation, nor even the interpretation deemed *most* reasonable by the courts."  
 24 *Entergy*, 556 U.S. at 218 (2009) (citation omitted). The CWA contains no provision  
 25 requiring public interest reviews of proposed discharges of dredged material; *Chevron*  
 26 step two therefore applies. Plaintiffs cannot show that the Corps' rulemaking regarding  
 27 public interest reviews reflects an unreasonable interpretation of the CWA.

1        Congress has concluded that the operation and maintenance dredging that is the  
 2 subject of the current immediate need action ROD is in the public interest. Congress  
 3 authorized construction of the Lower Snake River Projects in Section 2 of the Flood  
 4 Control Act of 1945. *See* 59 Stat. at 21. Congress also required that the navigation  
 5 channel be established at 14 feet deep by 250 feet wide at Minimum Operating Pool,  
 6 and provided the Corps with authority to maintain the channel at those dimensions. 76  
 7 Stat. at 1193. The Corps has performed navigation dredging in the Lower Snake River  
 8 on at least 17 occasions since 1961, when the navigation channel was constructed for  
 9 Ice Harbor Dam, the first of the four lower Snake River dams. *See* EIS at 1-12 to 1-13.  
 10 Congress appropriated funds for all prior lower Snake River dredging actions, as well  
 11 as for the planned Current Immediate Need Action. Pursuant to the applicable CWA  
 12 regulations, the public interest review provision contained in 33 C.F.R. § 320.4(a) does  
 13 not apply to the current maintenance dredging project.<sup>16</sup> Accordingly, Plaintiffs cannot  
 14 prevail on the Fifth Claim for Relief alleged in their Complaint.

15 **VII. Potential Harms to the Corps and Navigational Safety Outweigh  
 16 Plaintiffs' Speculative Assertion of Harm to Pacific Lamprey**

17        Even if Plaintiffs had shown a likelihood of irreparable harm and likelihood of  
 18 success or substantial questions going to the merits, an injunction would still be  
 19 inappropriate given the balance afforded to the public and other interests. *See Winter*,  
 20 555 U.S. at 22. “[T]he Supreme Court has not established that, as a rule, any potential  
 21 environmental injury merits an injunction . . . [Ninth Circuit] law does not . . . allow  
 22 [courts] to abandon a balance of harms analysis just because a potential environmental  
 23 injury is at issue.” *Lands Council v. McNair*, 537 F.3d 981, 1004–05 (9th Cir. 2008).

24  
 25  
 26       <sup>16</sup> The Corps did complete a public interest review for the permits issued to the Ports of  
 27 Lewiston, Idaho and Clarkston, Washington for related/ancillary port berthing area  
 28 maintenance dredging that will be conducted at the same time as the Corps' federal  
 navigation channel maintenance dredging. Vail Decl. ¶ 9.

1       The Corps understands that the Inland Port and Navigation Group will be  
 2 submitting factual information showing the threat to navigational safety that would  
 3 remain with any preliminary injunction. Ensuring navigational safety, when compared  
 4 to the speculative harm that Plaintiffs assert, favors denying the injunction. *See*  
 5 *Cottrell*, 632 F.3d at 1135 (requiring that the balance of harm tip *sharply* in favor of an  
 6 injunction under substantial questions standard). Because of in-water work windows  
 7 for the benefit of aquatic species, an injunction would effectively delay sediment  
 8 removal for at least one additional year. *See* Shelin Decl. ¶ 7. During that time,  
 9 shoaling and navigational impairment will only continue.

10       At least two other public interest considerations further tip the scale against  
 11 preliminary injunctive relief. First, Congress has already determined that the Lower  
 12 Snake River should be maintained for navigation. *See* 59 Stat. at 21. Congress has also  
 13 explicitly directed that the navigation channel should be maintained at 14 feet by 250  
 14 feet. 76 Stat. at 1193. Those determinations are not subject to review in this suit and  
 15 Plaintiffs should not be allowed to subvert Congress's legislative directive with  
 16 unsubstantiated and speculative allegations of harm to Pacific lamprey. *Accord United*  
 17 *States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (in crafting  
 18 injunctive remedies, "a court sitting in equity cannot 'ignore the judgment of Congress,  
 19 deliberately expressed in legislation'" (citation omitted)).

20       Second, a preliminary injunction would run counter to full implementation of  
 21 measures deemed necessary to ensure the ongoing protection of salmon and steelhead  
 22 listed as threatened or endangered under the Endangered Species Act. Congress has  
 23 charged the National Marine Fisheries Service (NMFS) to evaluate effects on listed  
 24 salmonids. 50 C.F.R. § 402.01(b). NMFS has issued a biological opinion for the Federal  
 25 Columbia River Power System that addresses the Corps' operation of the Lower Snake  
 26 River projects, including Lower Granite Dam. Vail Decl. ¶ 6 & Attach. A. The biological  
 27 opinion directs the Corps to operate the Lower Snake River Projects within one foot of  
 28

1 the Minimum Operating Pool from April through approximately September 1 of each  
 2 year, unless an adjustment is necessary to meet authorized project purposes (such as  
 3 navigation). *Id.* These measures are intended to reduce the cross-section of the  
 4 reservoir, which minimizes water travel time and aids in downstream juvenile  
 5 salmonid migration through the reservoir. *Id.* While NMFS recognized that limited  
 6 adjustments to these operations can be made, it also clearly specified those operations  
 7 that are most beneficial to listed salmonids. *Id.* Given the current navigational  
 8 impairments, the Corps has been forced to raise the pool level at Lower Granite Dam in  
 9 order to implement Congress's navigational directive and ensure safe navigation. Vail  
 10 Decl. ¶ 6. An injunction would force the Corps to continue this operation. NMFS's  
 11 expertise and judgment on measures necessary to ensure compliance with the  
 12 Endangered Species Act should be afforded deference. *Cf. Idaho Watersheds Project v.*  
 13 *Hahn*, 307 F.3d 815, 830 31 (9th Cir. 2002) (deferring "to the considerable agency  
 14 expertise" in fashioning equitable relief). An injunction that hinders—rather than  
 15 facilitates—full implementation of NMFS's biological opinions is not in the public  
 16 interest. In addition, the Current Immediate Need Action will further benefit listed  
 17 salmonids through the creation of shallow water habitat. Shelin Decl. ¶¶ 11–12.

18 **Conclusion**

19 Plaintiffs base their motion on a speculative harm to Pacific lamprey. The  
 20 motion should be denied on that basis alone. Plaintiffs have also failed to demonstrate  
 21 even a serious question going to the merits of their claims, and the balance of the harm  
 22 favors allowing the Corps to remove the current navigation-impairing sediment.  
 23 Plaintiffs' motion should be denied.

24 Dated: December 15, 2014  
 25

26 SAM HIRSCH  
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28 s/ Kristofor R. Swanson

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22 **Certificate of Service**

23 I hereby certify that on December 15, 2014, I filed the above pleading and  
24 associated declarations with the Court's CMS/ECF system, which will send notice to  
25 each party.

26 *s/Kristofor R. Swanson*  
27 KRISTOFOR R. SWANSON